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ABSTRACT

This publication discusses public school administrators' legal rights to continuing employment, as established by litigation in state and federal courts. Although the number of court cases dealing with school administrators' employment rights has been relatively small, a number of recent cases at both the federal and state levels are examined. Generally, school administrators have been considered employees who serve at the pleasure of the school board, and school boards have been granted wide discretion in hiring and firing administrators. However, there is a trend toward extending teachers' constitutional guarantees to school administrators as well. Principals have something of an advantage over superintendents and supervisors in this regard, since principals historically have been regarded as head teachers, rather than as agents of the school boards. (JG)

A Legal Memorandum

NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS
1904 Association Drive
Reston, Va 22091

September 1973

Concerning

THE ADMINISTRATOR'S RIGHT TO CONTINUING EMPLOYMENT

Attempts to write definitively on public school administrators' rights to continuing employment are risky because the states vary widely in the statuses they accord their administrators. Nonetheless, few observations can be made from the limited number of cases on this subject and parallels drawn from similar litigation involving teachers and other public employees.

Shortage of Litigation

A comparison with the immense volume of case law in which teachers seek damages, reinstatement, back pay and similar relief shows a real paucity of litigation in which administrators as plaintiffs move to contest their removal. This condition may exist because conflicts between school administrators and their boards of education tend to be settled short of going to court or, at least, to a level where cases are reported. Far more representative of the type of litigation in this area is a case which arose in Texas in 1971. A disgruntled female teacher whose employment had been terminated on recommendation of her immediate supervisor sought $10,000 damages for alleged deprivation of her civil rights. She claimed that her employment had been terminated because she would not submit "to improper advances" made to her by her supervisor, who thereupon recommended her release. The court, however, dismissed her complaint for lack of a substantial federal question, and held that when she accepted her final salary check that she had made a knowing waiver of any right to notice and a hearing before the board of education. While the administrator's misconduct was not in question, the court did hold that his actions, if true, were "outside the scope of his employment," hence relieving the board members of any personal liability on their part. Cochran V. Odell, 334 F. Supp. 555 (Tex. 1971).

In addition to possible out-of-court settlements, at least three other reasons are advanced to explain the paucity of litigation relating to the administrator's right to continuing employment. First, school administrators in most of the states ordinarily are not covered by the same tenure statutes that protect teacher employment. Second, statutory law in some states allows local boards to re-assign a principal back to classroom duty without the necessity of a hearing on the merits. Such statutes have been upheld as a valid exercise of legislative power. See Draper v. School Dist. No. 1, City and County of Denver, 486 P.2d 1048 (Colo. 1971); Van Dyke v. Bd. of Education, 254 N.E.2d 76 (Ill. 1970). The reason given is that persons may become eligible for tenure as teachers, but not as principals; subsequent actions on the part of the board are "for the good of the district." Third, school

administrators are considered to be district employees, not officials, and serve at the pleasure of the board. They are more likely to be controlled by the conditions of their contracts, which may contain a no-tenure clause, and a 30-day termination provision as part of the conditions of employment.

Employee v. Official

Official is defined as one who holds a position of trust created by law, in contrast with an employee, who works for wages in the service of an employer. The distinction is important here, since a school administrator's legal rights flow from his status in the state system. A public official exercises some of the sovereign power of the state without control from a superior officer or board, holds an office for a fixed term, and is generally elected by popular vote. An employee, on the other hand, serves at the pleasure of the employer, and as in the case of the school administrator, often has his duties tightly drawn in the contract. Legally speaking, therefore, it may not only be inexact but even misleading to refer to the school administrator as a school official.

A Common Law Position

It is more likely to be practice in the states to define the work status of the principal and/or superintendent in the common law, rather than by statute. The right of the local board to refuse to continue the administrator's employment is a common law corollary of its right to employ him in the first place. The leading case on this subject established the principle that the board had the legal right, even in the absence of a statute permitting it to do so, to levy taxes to support a high school and to employ a superintendent of schools. The Supreme Court of Michigan settled that question for all time in 1874, when it struck down a taxpayer's challenge to such board power, using in part these words:

> Having reached this conclusion [that it is legal to levy a tax for a high school], we shall spend no time upon the objection that the district. . .had no authority to appoint a superintendent. . .. We think the power to make the appointment was incident to the full control which by law the board had over the schools. . .and that the board and the people of the district have been wisely left by the Legislature to follow their own judgment in the premise. Stuart v. Kalamazoo Sch. Dist., 30 Mich. 69 (1874).

The case opened the way to wide employment of school administrators, the courts refusing to intervene in such affairs, unless the board had clearly acted outside its legal powers, or in an arbitrary, capricious, or illegal manner. Thus, the common law provides an insight albeit incomplete upon the right to continuing employment of school administrators today, almost 100 years later.

Federal Cases

The federal court cases are not numerous, but may be expected to increase just as litigation involving teachers' constitutional rights has

due process clause was meant to prevent," said the court. However, the Circuit Court took pains to warn that future cases involving continuing employment for school administrators must turn upon a determination of the particular duties of the administrator in question, and "his working relationship with the school board" in balancing the interests of the state with that of the employee of the state.

Following desegregation, the position of a black principal was eliminated by consolidation, and he was assigned to a teaching position, while two white persons without previous experience were named as principals inthe district. The Court held that the black principal should have been offered the principalship; to deny him this right was denial of due process and equal protection sufficient to entitle him to recover damages for loss of pay. James v. Beaufort Co. Bd. of Educ., 384 F. Supp. 711, aff'd., 465 F.2d 477 (N.C. 1971); see also Bassett v. Atlanta Ind. Sch. Dist., 347 F. Supp. 1191 (Tex. 1972).

State Cases

A superintendent in Kentucky objected to his dismissal for being politically active in supporting certain persons as candidates for the board of education. (His candidates lost). The court said that he had a right to be thus active, but said that "if he loses, his record of performance in office had better be above reproach, because the winners are also human, and will scrutinize his armor for an Achilles heel." Bell v. Board, 450 S.W. 2d 229 (Ky. 1970). He also charged that at his hearing none of the board members disqualified themselves because they were biased or prejudiced against him. The court then pointed out the realities. "It might as well be recognized," it said, "that board members who prefer charges against a superintendent. . .are likely to be prejudiced from the inception. The cold fact of formal charges evinces the accusers' predisposition. Though they might (and probably did) disclaim it, human nature is too well known for pretense to be indulged. . .Unfortunately, human nature is an unavoidable risk of the game."

In some states, non-constitutional issues will not be entertained by the state courts until a certain administrative procedure specified in the statutes or rules and regulations of the state board of education have been exhausted. James v. Bd. of Trustees, 376 S.W. 2d 956 (Tex. 1964). On issues involving civil rights and other constitutional guarantees, one need not go through the state courts, but may seek relief directly in either a federal district court, a hearing before the state's civil rights commission, or the Equal Employment Opportunity Commission.

States differ too as to the effect reorganization of districts may have on the right of the administrator to continued employment. In California, a superintendent's contract did not survive the reorganization of his district with another, and he could not assert his right to continuing employment against the newly-formed district. Millsap v. San Pasqual U.H.S. Dist., 42 Cal. Rptr. 778 (1965).

been on the increase. Drawing the most attention at present is a case involving a junior college president in Illinois, who was dismissed for breach of his administrative duties in that he initiated a memorandum to his administrative staff on possible revisions of the college's ethnic studies program. After an unknown person made a copy of the memorandum public, certain defendants questioned the president's right to make such a proposal and told him that it amounted to a breach of his administrative duties and was not a matter of free expression. He was summoned to the office of the board's counsel and given the choice of resigning or taking the consequences of being fired. The publication of the memorandum was mentioned as being the prime reason for his termination, although he was told he would be fired without any notification of the charges against him. It was not until after official action to terminate him had been taken that the board finally got around to providing him with a list of charges.

The line of reasoning employed by the federal district court is interesting. Hostrop v. Bd. of Jr. College, 337 F. Supp. 977 (Ill. 1972). In holding that the administrator had not been deprived of due process of law, even though he was not accorded a hearing nor given official notification of the charges against him, the court said in part:

> This Court does not think that there need be the same 'vigilant protection' when an administrator is involved as may be necessary when a teacher is. . . The fact that the policies of the board, a publicly elected body, are carried out through their chief administrative officer calls for that body to have the "confidence" of its administrator. The board must therefore have wide discretion in deciding whether to fire or hire a person who will be or has been in essence its agent.

On writ of error, the Seventh Circuit Court of Appeals reversed the court below, using in part this reasoning:

> Plaintiff, as a public employee, is entitled to be protected from retaliation for actions which he had every reason to believe were a part of his assigned duties. The facts alleged in his complaint indicate that he has a cause of action resulting from the deprivation of substantive due process. . . . Plaintiff's complaint makes a creditable showing of a deprivation of liberty. . .through attacks on his veracity and accusations of misrepresentation, supplying false information, and withholding important information [and]. . ."property" as it is defined in Roth, 92 SCt. 2701 . . . A term of employment set by contract has been recognized as a property interest which the state cannot extinguish without conforming to the dictates of procedural due process. Hostrop v. Bd of Jr. College Dist., 471 F.2d 488, 494 (Ill. 1972).

Thus, the Court was declaring that the administrator had been dismissed not only for an impermissible reason (First Amendment freedom of expression) but also for a denial of due process of law as well. "These facts clearly show arbitrary action on the part of the [board] which the

However, a school principal who ended the practice of various people buying groceries through the school lunchroom, and who was dismissed for his pains, was ordered reinstated by the court. Madison Co. Board of Educ. v. Miles, 173 So. 2d 425 (Miss. 1965). The court found no evidence of guilt on the principal's part, and pointed out to the board that instead of firing the principal, it ought to commend him for his actions.

In South Carolina, a court upheld the principal's right to go on working, despite the fact that his accounts were poorly kept and inadequate. There was nothing in the record to suggest that he personally profited from the funds entrusted to his care, and no one was financially damaged as a result of his manner of handling the funds. Betterson v. Stewart, 140 S.E. 2d 482 (S.C. 1965).

On the other hand, where a superintendent prescribed a certain way in which he wished the books to be kept, but the principal was obstinate and refused to follow his orders, the latter was legally removed for such failure to follow the prescribed method. Bd. of Educ. v. Chattin, 376 S.W.2d 693 (Ky. 1964). "Talent or even genius to the contrary," said the court, in upholding his dismissal, "failure to comply with competent orders of a superior official is substantial cause for disciplinary action and, under the facts and circumstances of this case, for discharge." (at 696.)

Suspension for a long period of time may amount in effect to termination, said one court, in reducing a principal's suspension from 69 days to 50, since the hearing panel had recommended 14 days. LeTarte v. Bd. of Educ., 316 N.Y. S.2d 781 (1970). And the arbitrary transfer of a principal and his assistant principal amounted to dismissal where they were removed without cause and given no hearing before the board. The father of a disciplined boy had started a campaign to get rid of the two and had convinced the board, which was acting without benefit of counsel, to take the action leading to their transfers. Blair v. Mayo, 450 S.W.2d 582 (Tenn. 1970).

In Texas, a superintendent was discharged because of internal "discord" among school personnel. The appeals court ordered the board to pay his salary nonetheless. McRae v. Lindale Ind. Sch. Dist., 450 S.W.2d 118 (Tex. 1970). A superintendent in Kentucky was dismissed for "failure to supervise," and the court said it would not interfere to retry the case or inquire into the board's motives if the discretion of the board was not abused and if the findings were based "on competent and relevant evidence."

A superintendent in New York was dismissed and sued the board for damages, alleging that he had been libeled by a resolution spread upon the minutes to the effect that "his presence is detrimental to the district." The court said, however, that the members, in line of duty, "are clothed with an absolute privilege for what is said or written by them in discharging their responsibilities." Smith v. Helbraun, 251 N.Y.S. 2d 533 (1965).

Summary

The volume of litigated cases dealing with school administrators' rights to continuing employment is small when compared with comparable litigation involving teachers. Nevertheless, there is a trend toward the extension

of constitutional guarantees hammered out for teachers to be extended to school administrators as well. Ordinarily, however, the relationships between administrators and employing boards of education are of such a nature as to preclude large numbers of cases on the subject of administrators' continuing employment rights.

Principals probably have something of an advantage over superintendents and supervisors when it comes to the right to continuing employment. Historically, the principal has been regarded as the head teacher rather than a representative of the board of education, and to the extent that the courts view them in this way, they are afforded more employment protection than other administrators.

Pennsylvania, for example, seems to clearly recognize principals as "professional employees" with tenure in their positions, but this concept is not extended to assistant principals, assistants to principals, deans, or other school administrators. As noted in an article in the Illinois Principal[1] a few years ago, no clear pattern has been developed in most states, except that principals are recognized as having tenure as teachers.

On the other hand, principals are being increasingly regarded as part of the supervisory staff of the school system and hence as agents of the state. To the extent that this change occurs, principals will have to recognize that their increased status and privileges are likely to be accompanied by the loss of the legal protection afforded to instructional employees.

> Trying to live a double life is never easy, and the role of principal must become more legally specific if his/her protections on the job are to continue. If the trend just noted continues--to view the principal as purely administrative--greater security in the position can be attained through such channels as (1) collective bargaining units to present the board with the principal's point of view; (2) clearer delineation of the position of the principal in contracts of employment; and/or (3) performance objectives and criteria by means of which a more objective and less subjective view of the work of the principal can be evaluated. If the Seventies promise no more than a clarification of the legal role of the principal, that will be an accomplishment of no mean proportion.[2]

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1 Ralph A. Belnap, Illinois Principal; "Legally Speaking", March 1970, pp. 12-14

2. See NASSP Legal Memorandum on "The Legal Status of the Principal" (Rev. 1973).

The contributing editor of this Legal Memorandum was M. Chester Nolte, chairman, Educational Administration, University of Denver, in Colorado. He acknowledges permission of the Parker Publishing Company of West Nyack, N.Y., to reprint portions of a forthcoming (Oct. 1973) book entitled Duties and Liabilities of School Administrators.

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